Supreme Court, U.S.
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No. 90-1864

In The

Supreme Court of the United States

October Term, 1991

NEW YORK STATE DEPARTMENT OF HEALTH,

Petitioner,

-against-

JOANNA ANDRULONIS, ET AL.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF JOANNA ANDRULONIS, INDIVIDUALLY AND AS CONSERVATOR OF THE PROPERTY OF JEROME ANDRULONIS, AS RESPONDENT IN OPPOSITION TO THE PETITION

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OPINIONS BELOW

The opinion of the court of appeals (App. A1-A45) is reported at 924 F.2d 1210. The opinion of the district court (App. A46-A389) is reported at 724 F.Supp. 1421. A related opinion of the district court (App. A390-A398) is reported at 593 F.Supp. 1336.

JURISDICTION

The judgment of the court of appeals (App. A401-A402) was entered on March 12, 1991. The petition for a writ of certiorari was filed on June 3, 1991, and received by respondent on June 4, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE[1]

In 1967, George Baer was an employee of the United States Government with a worldwide reputation in rabies research, who had already been working on wildlife rabies immunization for more than five years, and who reported placing a wolf at the mouth of a cave in New Mexico to confirm that rabies could be transmitted via the aerosol/airborne route of infection (J.App.1243); [Exh.137].

Mr. Andrulonis was a Bacteriologist, occupying that New York State Civil Service position from 1968 until the events at issue herein occurred (J.App.1717). Griffin Laboratory, where plaintiff worked, was:

> "the farm" of the Divisions of Labs and Research . . . it was the laboratory that dealt primarily with the raising of laboratory animals as well as farm animals which were used for serum production to be sent down to what we call the main laboratory on New Scotland Avenue at that time, before the laboratory was built in the Tower and part of the Griffin Laboratory was the rabies diagnostic section which was set out there years ago as the place.

(J.App.91, 92). The Griffin Laboratory was, again according to Dr. Debbie, Plaintiff's supervisor, "strictly a diagnostic unit" (J.App.92) and, in fact, the laboratory was often referred to as a horse barn.

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[1] References to "App, A ___" refer to pages of the appendix to the petition submitted by Petitioner New York State Department of Health. References to "Tr. ___" refer to pages of the trial transcript. References to "Exh. ___" refer to trial exhibits. References to "J.App. ___" refer to pages of the joint appendix in the Court of Appeals.

Approximately two years after Mr. Andrulonis began working at Griffin Laboratory, Dr. Baer visited that facility "to discuss with Dr. Abelseth and [Dr. Debbie] the fact that he had been able to take liquid vaccine and place it on the tongue of a Grey Fox and have that Grey Fox produce antibodies against rabies . . . " (J.App.97). Dr. Baer, in 1970, was Chief of the Viral Zoonosis Branch and Rabies Laboratory at the Center for Disease Control ("CDC") in Atlanta and Lawrenceville, Georgia (J.App.1109). Dr. Baer had been at the CDC since approximately 1962 and was the major proponent of an effort to orally immunize wildlife against rabies since the early 1960's. In fact, Dr. Baer was somewhat renowned for "the famous attempts with what was called the coyote-getter to shoot a syringe into the mouth of an animal to vaccinate him for rabies" (J.App.98).

Dr. Baer was the preeminent expert, the world's authority on rabies (J.App.509-11; 1110; 1225-26; 1250-51; 2212; 2329; 2331). Baer was the editor and author of a substantial portion of the two-volume treatise on the subject of rabies (Exh.112; 4735-5590).

Dr. Baer had come to the Griffin Laboratory since the New York State Health Department had access to more foxes than did Dr. Baer at the CDC. He also turned to New York State because at his agency, the (CDC), the oral vaccination activity was viewed with little interest (J.App.2213) and more than a little concern (J.App.2241). Baer wanted the State employees to orally administer ERA rabies virus to foxes and see how many would, in fact, produce antibodies (J.App.99, 100). At that point, Dr. Abelseth and Dr. Debbie decided they *"were going to do it in conjunction with Dr. Baer,* inasmuch as he had the

vaccine and we had the foxes." (J.App.100) (emphasis added).

ERA rabies virus was a specific "attenuated" strain which had been demonstrated to be safe for use in certain species of animals, *not* including man (J.App.1253-54). "Attenuation" is a term which was referred to often before and during the trial with some confusion. It was a term often alluded to by the Government with respect to the ERA virus brought by Dr. Baer to Griffin Laboratory with the implication that it had been made less pathogenic. It is important to note, however, that any decrease in pathogenicity is limited by species, and that when a strain of rabies becomes *less* pathogenic for one species, it could simultaneously become *more* pathogenic for another (J.App.1257).

As noted above, Dr. Debbie and his subordinates at Griffin Laboratory, including plaintiff, had been solely involved in rabies diagnostic work prior to that time (J.App.92). Subsequent to Dr. Baer's visit, however, Baer (under the guise of the CDC) and the State of New York (through Debbie) conducted a joint effort to further the wildlife immunization work (J.App.142). The oral immunization work advanced until 1974 when Dr. Debbie received a patent (Exh.13) from Dr. Baer which related to the coating of tablets ("pareils") by which Debbie and Baer envisioned immunizing wildlife through the enteric (intestinal) route (J.App.142).

As a result of Dr. Baer's provision of the patent (Exh.13), and his discussion of the related process, Dr. Debbie thereafter contacted an entity known as the Wisconsin Alumni Research Foundation ("WARF"), which

was the licensing agent for that process by which the pareils could be coated with various substances (J.App.144). A machine known as a Uni-Glatt, manufactured and distributed by the Glatt defendants, was rented during July and November/December 1976 (J.App.200). After those uses it was clear to Baer and Debbie that the ERA-BHK_{21} being sprayed on the pareils was losing its titer due to the machine heat generated during the process (J.App.477). ("Titer" is a measurement of the number of particles or the quantity of virus concentrated in any particular preparation) (J.App.977). Baer and Debbie discussed the need to start with a higher titered ERA-BHK_{21} virus so that a useful and effective product should remain after coating. Dr. Debbie and his subordinates did not have the knowledge or expertise to prepare such a substance (J.App.191-92).

Baer consequently prepared an ERA-BHK_{21} virus which had a titer of $10^{8.5}$ by "passaging" the material in baby hamster kidney (BHK) cells (Exh.151); (J.App.192). ("Passaging" is the procedure by which a rabies virus is grown on a tissue culture in order to multiply the virus, and it was well known by Dr. Baer that the process caused mutations in the original virus) (J.App.1254-57; 1793-94; 2447-52; 2503).

Dr. Baer motivated the coating project at the State laboratory with the provision of the patent, which led to the rental of the Uni-Glatt with funds Baer circuitously provided outside the permitted provisions at the CDC (J.App.198-200; 488-89; 536-37; 590-91; 630; 1201; 2491; 2555-56; 7141-60). Baer personally brought the passaged virus to the Griffin Laboratory on March 29, 1977. Dr. Baer transported the virus on a commercial flight, in

violation of CDC regulations. (The Government failed to produce any evidence that Dr. Baer recorded his provision of the rabies virus; consequently Dr. Baer's superiors had no knowledge of his provision of the virus) (J.App.2193). Baer gave the virus to Dr. Debbie for use in the Uni-Glatt, which Dr. Baer knew was not airtight (J.App.482). Dr. Baer merely recited the titer of the virus and gave no other information regarding his virus to Dr. Debbie or to plaintiff, who was "around the machine the most" (J.App.190). Dr. Debbie and plaintiff used that virus to coat pareils which were visibly popping out of the machine during the process while Dr. Baer personally observed the procedures (J.App.482).

As a result of the negligent failure of Dr. Baer to warn plaintiff of the massive amounts of mutated viral rabies particles to which he was exposed during the experiment on March 29, 1977, plaintiff was infected with rabies (J.App.2528). Although plaintiff had been pre-immunized with the Lilly rabies vaccine, the aerosolized virus provided by Dr. Baer circumvented any protection afforded by the Lilly vaccine since the route of infection was the plaintiff's olfactory nerve endings (J.App.1393-97).

Although plaintiff is only one of three people known to have survived the torment of the disease itself, he was left severely and permanently brain damaged. At the time of trial, and continuing today, plaintiff has the mental capacity of a child somewhere between the ages of 2-4 years old. He is incapable of carrying on a normal conversation and after 15 years of therapy he has increased his attention span to only 30 minutes. He is unable to take care of his own basic needs such as feeding and washing himself. His memory of his family and his life before his

illness is permanently lost and he has suffered profound personality and behavioral changes. His demeanor is usually detached and uncommunicative, but his moods can change dramatically and he becomes restless, agitated and even violent. On many occasions he has kicked, punched and pushed his own wife and children. He will require constant supervision for the rest of his life. (See generally, J.App.2636-2642).

ARGUMENT

Petitioners seek a writ of certiorari based on their view that this Court's decision in *United States v. Gaubert*, 111 S.Ct. 1267 (1991) somehow undermines the analysis of the Court of Appeals herein. A review of the reasoning of the Court of Appeals, however, demonstrates that this view represents the triumph of hope over analysis.

The decision in *Gaubert* was entered upon a motion to dismiss and consequently lacked the explicit findings of fact and the thoroughly developed record available to the Court in the instant case. In addition, the decisions of the federal employees in *Gaubert* were part of a larger regulatory scheme and, as such, were exactly the type of decisions Congress intended to insulate from challenge by the enactment of the discretionary function exception. In *Andrulonis*, there was no formal program as evidenced by the testimony of the government's own witness, Dr. Walter Dowdle, who stated, "CDC has never really had a *program*, as such. It's been a research interest and it's been a fairly low-level research interest . . . " (J.App.2213 [emphasis added]); (J.App.2240). There is *no* record evidence of any social, political, or economic policy considerations made in pursuit of establishing any "program for enteric research" by Health and Human Services, by CDC, by Dr. Baer *or anyone in the government's employ*, either generally, concerning the provision of the manipulated rabies virus to the state, or specifically, concerning the failure to warn of the hazards of the procedure he witnessed in light of the equipment used and/or the choice not to halt the procedure. It is entirely implausible that one *could* weigh public policy when failing to warn plaintiff that his exposure to the airborne virus carried

with it a terrible risk. In other words, there is no basis *in the record* for alleging that Baer's decision was "susceptible of policy analysis."

The analysis of the Court of Appeals, in applying the facts of *Andrulonis*, not only fails to depart from the *Gaubert* analysis, in any significant way, but actually presages the *Gaubert* analysis.

Justice White's decision in *Gaubert* states:

> The exception covers only acts that are discretionary in nature, acts that "involv(e) an element of judgment or choice," *Berkovitz, supra*, at 536, 108 S.Ct., at 1958; see also *Dalehite v. United States*, 346 U.S. 15, 34, 73 S.Ct. 956, 967, 97 L.Ed. 1427 (1953); and "it is the nature of the conduct, rather than the status of the actor," that governs whether the exception applies. *Varig Airlines, supra*, at 813, 104 S.Ct., at 2764. The requirement of judgment or choice is not satisfied if a "federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow," because "the employee has no rightful option but to adhere to the directive." *Berkovitz*, 486 U.S., at 536, 108 S.Ct., at 1958.
>
> Furthermore, even "assuming the challenged conduct involves an element of judgment," it remains to be decided "whether that judgment is of the kind that the discretionary function exception was designed to shield." *Ibid.* See *Varig Airlines*, 467 U.S., at 813, 104 S.Ct., at 2764.

Gaubert, supra, at 1273.

In commencing its analysis of the instant case the Court of Appeals states:

> To determine whether conduct falls within the exception, we must focus on "the nature of the

> conduct, rather than the status of the actor," *Varig Airlines*, 467 U.S. at 813, 104 S.Ct. at 2764, and use a two step process to examine the challenged conduct. See *Berkovitz v. United States*, 486 U.S. 531, 536, 108 S.Ct. 1954, 1958-1959, 100 L.Ed.2d 531 (1988); *In re Joint E. & So. District Asbestos Litigation*, 891 F.2d 31, 36 (2d Cir. 1989). First, we must consider whether the conduct was a matter of choice for the acting employee, and if so we must then determine whether the employee's actions involved public policy considerations. *Asbestos Litigation*, 891 F.2d at 36.

Androlonis v. U.S., 924 F.2d 1210 (2d Cir. 1991) at 1218.

In *Gaubert*, the Fifth Circuit incorrectly interpreted *Berkovitz's* reference to *Indian Towing* as "perpetuating a nonexistent dichotomy between discretionary functions and operational activities" *U.S. v. Gaubert*, 111 S.Ct. 1267 (1991) at 1275. In the instant case the Second Circuit Court of Appeals made no such error but correctly analyzed *Indian Towing* in light of *Varig* and concluded "in short, the key inquiry is whether the decisions, be they initial decisions or implementation decisions, were necessarily susceptible to policy analysis. *Asbestos Litigation*, 891 F.2d at 37; *United States Fidelity and Guar. Co. v. United States*, 837 F.2d 116, 121 (3d Cir.), cert. denied, 487 U.S. 1235, 108 S.Ct. 2902, 101 L.Ed.2d 935 (1988)." *Andrulonis v. U.S.*, 924 F.2d 1210 (2d Cir. 1991) at 1219. The Court of Appeals went on to state,

> the situation simply did not lend itself to policy balancing, not (sic) is there any indication that Dr. Baer considered the policy implications or the pros and cons of allowing the experiment to proceed. Once he became aware of the risks, Dr. Baer was obligated to give warning. His is precisely the type of negligent omission to which

> Congress waived the government sovereign immunity in order to provide redress to citizens for the torts of government actors.

Andrulonis v. U.S., 924 F.2d 1210 (2d Cir. 1991) at 1219.

Finally, the Court of Appeals concluded its analysis by stating that

> the District Court, however, was able to penetrate the complex facts of this case and determine that Jerome Andrulonis' illness resulted, at least in part, from Dr. Baer's failure to warn of the potentially disastrous consequences of the March 29th experiment he was observing. This was a nondiscretionary negligent omission that did not implicate any balancing of policy factors.

Indeed, the government's own witness, Dr. Walter Dowdle, testified that, according to CDC practice and policy, Dr. Baer should have intervened and stopped the experiment. (J.App.2219). This conclusion was concurred in by CDC's own safety officer, and the government offered no proof at trial that Dr. Baer had any discretion to act otherwise. In fact, it was respectfully pointed out to the Court below that not only were the actions of Dr. Baer not "susceptible to policy analysis," it was unnecessary for the court to even address the second part of the *Berkovitz* test, since the uncontroverted testimony of the government's own witnesses and the government exhibits evidenced that CDC's own policies "specifically prescribed the course of action for (Dr. Baer) to follow" in that Baer "had no discretion to deviate from (a) mandated procedure" *Berkovitz* at 546; *Dickerson v. United States*, 875 F.2d 1577, 1581 (11th Cir. 1989).

Petitioner's further efforts to argue that this Court should grant certiorari based on the conflicts in earlier rulings in the circuits are equally unavailing. The reasoning, in conclusions reached in the cases cited by petitioners from the Third, Sixth, Ninth and Tenth Circuits, is remarkably consistent. The standard analysis of a discretionary function exception argument begins with *Dalehite* and then extends to *Varig* and *Berkovitz* as applied to particular facts of the case in issue.

Petitioner's concern that "a number of other courts have emphatically rejected the Second Circuit's approach of conditioning discretionary function immunity on proof by the government that its employee, vested with discretion, actually engaged in a conscious, deliberate "balancing" of risks," (Petitioner's brief page 23), is based on a misapprehension of the Second Circuit's decision. The Circuit Court based its decision on the fact that the situation, "simply did not lend itself to policy balancing," (*Andrulonis v. U.S.*, 924 F.2d 1210 (2d Cir. 1991) at 1219); the Court's comments concerning Dr. Baer's failure to consider any policy implications are designed merely to underline the conclusion that the situation was *not susceptible* to such considerations.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: July 1, 1991

Respectfully submitted,

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